THE GOVERNMENT OF SARAWAK

v.

SAMI MOUSAWI-UTAMA SDN BHD

HIGH COURT SABAH & SARAWAK, KUCHING
IAN HC CHIN J
[ORIGINATING MOTION NO: 25-04-2000-I]
6 JULY 2000

CONTRACT: *Claim for work done - Claimant provided professional services for project pursuant to agreement - Whether claimant entitled to professional fees as claimant not registered as professional - Whether claimant did not perform but merely provided services - Whether non-registration immaterial - Architects Act 1967, s. 7A(1); Registration of Engineers Act 1967, s. 7A(1); Quantity Surveyors Act 1967, s. 7A(1)*

PROFESSION: *Architects - Non-registration of - Whether claimant entitled to professional fees for services rendered - Claimant a corporate entity - Whether claimant did not perform but merely provided services - Whether non-registration immaterial - Architects Act 1967, s. 7A(1)*

PROFESSION: *Engineers - Non-registration of - Whether claimant entitled to professional fees for services rendered - Claimant a corporate entity - Whether claimant did not perform but merely provided services - Whether non-registration immaterial - Registration of Engineers Act 1967, s. 7A(1)*

Pursuant to a Consultancy Services Agreement ('the CSA'), the respondent herein, Sami Mousawi-Utama Sdn Bhd, agreed to provide consultancy services, as architects, engineers and quantity surveyors for the construction of the state mosque for the applicant, the Government of Sarawak. The respondent claimed a breach of contract when the applicant failed to pay outstanding fees due under phase 1 of the said project and when the applicant appointed another consultant to undertake extension works for the said mosque. The applicant claimed that the CSA contravened s. 7A(1) of the Architects Act 1967, Registration of Engineers Act 1967 and Quantity Surveyors Act 1967 ('the said Acts') as the respondent was not registered nor approved to practise the disciplines under the said Acts.

The above matter was referred to arbitration wherein three learned arbitrators on different grounds made an award in favour of the respondent. Two of the arbitrators decided that the CSA did not infringe s. 7A(1) of the said Acts whilst the other arbitrator ('other arbitrator') disagreed but nevertheless decided

that the CSA was saved by s. 39 of the said Acts, *ie*, saving as to right of government. Hence, the applicant's instant application to set aside the said award.

Held:

[1] Evidence showed beyond doubt that the directors of the respondent who were not registered nor approved to practise under the said Acts, would ultimately be the beneficiaries of the fees for professional services. In that regard, the other arbitrator was correct in his dissenting view that it was the said directors who performed the architectural services through the vehicle of a corporate entity in the name of the respondent.

[2] The finding of the two arbitrators that the CSA did not require the respondent to practise or carry on business or take up employment as architects, engineers, or quantity surveyors was completely untenable since it was the respondent's case that it was formed to undertake the consultation work for the design and supervision of the said project. That was a serious failure to analyse and appraise material and relevant evidence which, justified the setting aside of the award.

[3] If the directors had claimed for the professional fees they would not be entitled since they were not registered under the said Acts. Neither would the respondent be entitled to claim for the same fees as it too was not registered to practice under the said Acts. The two arbitrators sought to justify their decision by saying that the respondent was not performing but providing for the services.

[3a] A corporate entity like the respondent could not by itself perform the services since such could only be performed by individuals. If the argument of the two arbitrators were upheld, it would mean that a corporate entity need never apply for the approval to practise while unregistered persons were allowed to practise under its umbrella. That would render s. 7A(1) of the said Acts completely useless. The award was therefore based on a principle of construction which the law did not countenance and thus should be set aside.

[4] The award should also be set aside on the grounds of public policy as it infringed the said Acts or it at least defeated the objective of the said Acts.

[5] As for the other arbitrator's reliance on s. 39 of the said Acts, the said arbitrator had misconstrued the same or proceeded on an interpretation which the law did not countenance. Section 39 merely restates what has already been generally provided by s. 127 of the Interpretation Acts 1948

and 1967. Section 39 also removes any implication that the State Government is bound.

[6] Assuming that the respondent merely undertook to provide professional services which were done by registered professionals, the fees, nevertheless, were not recoverable.

[Award set aside; costs to applicant.]

Case(s) referred to:

Assignee v. Chartered Industries of Singapore Ltd [1978] 2 MLJ 99 ***(refd)***
BEP Akitek (PTE) v Pontiac Land Pte Ltd [1992] 2 SLR 251 ***(foll)***
Champsey Bhara Co v. The Jivraj Balloo Spinning & Weaving Co Ltd 1923 AIR 66 ***(refd)***
Chung and Wong v. CM Lee [1934] MLJ 153 ***(refd)***
David Taylor & Son, Ltd v. Barnett [1953] 1 All ER 843 ***(refd)***
Ganda Edible Oils Sdn Bhd v. Transgrain B.V. [1988] 1 MLJ 428 ***(foll)***
Government of Kelantan v. Duff Development Co Ltd [1923] AC 395 ***(refd)***
Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & Anor [1999] 2 CLJ 788 ***(refd)***
Jeuro Development Sdn Bhd v. Teo Teck Huat (M) Sdn Bhd [1998] 3 CLJ Supp 366 ***(refd)***
KS Abdul Kader v. MK Mohamed Ismail [1954] MLJ 231 ***(refd)***
Kuala Ibai Development Sdn Bhd v. Kumpulan Perunding (1988) Sdn Bhd & Anor [1999] 1 CLJ 632 ***(refd)***
Ong Teong Pin v. Sim Kwan Meng & Anor [1994] 1 MLJ 485 ***(refd)***
PP v. Tan Kah [1993] 1 CLJ 83 ***(refd)***
Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 ***(refd)***
Syarikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority [1971] 2 MLJ 210 ***(refd)***

Legislation referred to:

Architects Act 1967, ss. 7(1)(c), A(1), 39
Architects (Scale of Minimum Fees) Rules 1986, pt. II
Evidence Act 1950, s. 2
Interpretation Acts 1948 and 1967, s. 39
Quantity Surveyors Act 1967, ss. 39. 7A(1)
Registration of Engineers Act 1967, ss. 4(1)(d), 7(1), A(1), 39
Sarawak Ordinance 1994, s. 8

Other source(s) referred to:

Bennion on Statutory Interpretation, 2nd edn, pp 317-318
Halsbury's Laws, 4th edn, vol 2, p 330, para 622

For the applicant - Datuk JC Fong, Sarawak State Attorney-General; Susan Gau, State Legal Officer
For the respondent - Tony Ling; M/s HC Lee & Partners

Reported by Usha Thiagarajah

JUDGMENT

Ian HC Chin J:

Introduction

Three learned arbitrators had on 22 February 2000 on different grounds made an award in favour of Sami Mousawi-Utama Sdn Bhd ("the claimant"), by answering affirmatively the preliminary issues that are worded in the following terms:

> Whether the Claimant (a body corporate) being not an "Architect", "Engineer" or "Quantity Surveyor", as defined in the Architects Act, 1967, Registration of Engineers Act, 1967 and Quantity Surveyors Act, 1967, (respectively) can, having regard to Sections 7 and 7A of the said Acts, provide in Malaysia, the comprehensive architectural, engineering and quantity surveying consultancy services for the design and supervision of the construction, building and erection of the new State Mosque and related buildings which the Claimant is contractually obligated to provide under the Consultancy Services Agreement dated 26th October, 1984. In any event whether the Claimant has a cause of action against the Respondent in respect of its entitlement to fees and other remedies pursuant to the Consultancy Services Agreement dated 26th October 1984 in light of the provisions of the Architects Act, 1967, Registration of Engineers Act 1967 and Quantity Surveyor's Act 1967.

They are formulated in consequence of the respondent's (the Government of the State of Sarawak) contention that the consultancy services agreement dated 26 October 1984 ("the CSA") which "purports to provide consultancy services, as architects, engineers and quantity surveyor in contravention of s. 7A(1) of [the said three Acts] is unlawful or illegal and hence unenforceable in law and equity." That was in answer to the claims by the claimant for (1) outstanding fees of RM300,057.61 due under phase I of the project and (2) for loss of entitlement of fees amounting to RM22,981,361.71 resulting from the respondent appointing another firm of architects instead of the claimant to perform the services for phase II and III of the project for the construction of the state mosque.

Two of the arbitrators decided on the ground that those sections have no application while the other arbitrator disagreed but nevertheless answered the questions positively on account of s. 39 of the three Acts which I will set out later.

The respondent came into the picture by virtue of a novation agreement made on 20 November 1984 under which it took the place of Lembaga Amanah Kebajikan Mesjid Negeri Sarawak ("the lembaga") which executed the CSA with the claimant signing as the other party.

a

Facts Of Case

On 5 July 1984 the British architectural firm called Sami Mousawi International ("SMI"), with Sami Mousawi as the principal, and the Malaysian architectural cum engineering firm called Perunding Utama ("PU"), with Abdullah Mohd. Noor as the principal, jointly wrote to the lembaga to propose the provision of comprehensive consultancy services for the design and supervision of a proposed new Sarawak State mosque. It was stated in the proposal:

b

(1) that SMI would prepare in the United Kingdom the architectural drawings from concept, schematic and outline design to actual tender drawings and specifications as well as the mechanical and engineering (M&E) report, layout, design and calculations; and

c

(2) that PU would assist in some of those works and, *inter alia*, prepared the civil work designs and drawings, cost estimates, structural drawings, M&E detail drawings and specifications and bills of quantities and PU would submit and seek approval of the building plans from all the relevant authorities.

d

The proposal mentioned that the fees to be charged would be based on that prescribed by the relevant professional bodies of the three Acts mentioned in the issue. It was also proposed that a legal entity would be formed to enter into the agreement with the lembaga.

e

The proposal was accepted by the lembaga. The claimant was formed and the CSA was executed incorporating the proposal. The claimant and the two directors were not registered nor approved to practise the disciplines covered by the three Acts. Sami Mousawi were also not registered nor approved under the Acts. The relevant provisions of the CSA are these, with the claimant described as the consultant and the lembaga as the client:

f

[Preamble]

g

… the Client … has appointed the Consultant to provide professional services for the project as described in the Consultancy Services Proposal ("… their Services").

... the Consultant … had agreed to provide the necessary technical expertise and professional services to undertake fully their Services as instructed by the Client..

h

...

NOW ... IT IS HEREBY AGREED…….

1. APPOINTMENT

i

The client hereby appoints the Consultant and the Consultant hereby accepts the appointment to undertake and complete their Services on the

terms and conditions hereinafter set forth and it being agreed and accepted that the Consultant shall solely be responsible to carry out their Services as described fully in the Consultancy Services Proposal.

2. SERVICES OF THE CONSULTANT

The services and duties to be performed by the Consultant shall include all those matters outlined in the Consultancy Services Proposal as well as the SCOPE OF SERVICES as per Appendix 'F'.

3. ORGANISATION OF THE CONSULTANT

The organisation of the Consultant and the programme of their Services shall be as set out in Appendix "C".

The project was divided in three phases, phases I, II and III. The scope of services, set out in appendix F of the CSA, include works which, taking the case of an architect, can lawfully be charged under the Architects (Scale of Minimum Fees) Rules 1986.

Two arbitrators are of the view that cl. 3 when read with appendix C requires that certain services must be performed by firms that have been named, viz:

ARCHITECTS/PLANNERS PARTNER	PERUNDING UTAMA MOHD ALI SALLEH
CONSULTANT ARCHITECTS DIRECTOR	SAMIMOUSAWI INTERNATIONAL SAMI MOUSAWI
CIVIL/STRUCTURAL PARTNER	PERUNDING UTAMA ABDULLAH MOHD NOOR
MECHANICAL ELECTRICAL DIRECTOR	PERUNDING UZL SDN BHD YUSOFF DAUD
QUANTITY SURVEYOR PARTNER	KUMPULAN UKUR BAHAN YUSOF ABDULLAH

That was the conclusion of the arbitrator Dato' VC George, Esq (and concurred by the arbitrator S. Sahathevan, Esq) and it was in the following words:

The names of the firms mandatorilly required to be appointed to provide the different Consultancy Services required for the project and the designation of one principal in each of the said firms, is set out in Appendix C, viz:

Sami Mousawi was under the impression that all those entities named there (excepting his own firm) were duly registered to practise. It was only after the arbitral hearing had commenced that he became aware that the person Abdullah Mohd Noor of perunding utama was never registered as an engineer.

However, one Paul Lim of the same firm was registered and he was the resident engineer for the project for the initial five months of the project though there was evidence to say he left PU in 1990. The arbitrator Dato' V.C. George, Esq, then came to the following conclusion:

> And so it would appear that nothing turns on the startling revelation that Hj Abdullah Mohd Noor had not been registered as an engineer. And in the absence of evidence to the contrary or even any suggestion to the contrary, it has to be and I do take it that there were principals in each firms named in Appendix C who were duly registered to practise their respective disciplines and in the case of the corporation Perunding UZL Sdn Bhd, it had obtained a s. 7A(1) written approval, to practise as M&E engineers.

They also found that the services under the agreement were not to be provided or performed directly by the claimant but by those professional firms. The arbitrator went on to say:

> However, the over-all picture that emerged clearly and a finding of fact has to be and is made by me in respect of that, which is, that, while the Claimants and Sami Mousawi and SMI and PU and Michael Shaw and Donald Smith Seymour and Rolly and Buro Happold and perhaps other experts, had each to play their respective roles in respect of the project, the Agreement of 26th October 1984 required, by Clause 3 and Appendix C thereof, that specific "personnel" be appointed by the Claimants to carry out the professional responsibilities of the Claimants and that the very "personnel" designated in Appendix C were in fact so appointed and it was they who had, no doubt in some cases with the help of the above mentioned experts, provided or are deemed to have provided the comprehensive architectural, engineering and quantity surveying Consultancy Services for the design and supervision of the construction, building and erection of the new State Mosque and related buildings which the Claimant was contractually obligated to ensure was provided under the Agreement of 26th October 1984.
>
> And so, in respect of the project, the Claimants were not required by the Agreement of 26th October 1984 or at all, to practise or carry on the business or take up employment as architects, engineers or quantity surveyors there is no evidence that they did.

They went on to hold that the scale fees payable under the agreement does not per se amount to the claimant practising those disciplines and s. 7 and s. 7A prohibitions of the three acts have no relevance. They held that the claimant can provide the services by appointing perunding utama, Perunding UZL Sdn Bhd and Kumpulan Ukur Bahan to provide for the same. But the arbitrator did not deal with the following letter that was adduced in evidence to establish the fact of the persons who submitted the plans, viz.:

STATE MOSQUE OF SARAWAK

SAMI MOUSAWI INTERNATIONAL
PERUNDING UTAMA

Architects, Planners, Engineers [Etc…]

March 15, 1985

Pengarah Kerja Raya,
… Sarawak.

Tuan,

Re: State Mosque of Sarawak
- Submission of final Design Drawings

Further to our meeting with YAB Ketua Menteri Sarawak together with your goodself on the 20th November 1984, we have great pleasure in making our submission which includes the following:

1. Architect Design Development Drawings

2. Structural Design Development Drawings

3. Services (Schematic Stage) Drawings

We enclose a copy of our list of the drawings prepared by our team of consultants.

It is very important for us to point out that, whilst it was agreed and confirmed in the meeting with YAB Ketua Menteri Sarawak on the 20th November, that we proceed with Phase I and II only. However, we have discovered during the design development stage that it was essential to extend the programs to include Phase IV and part of Phase III to ensure a completely integrated design from every aspect.

This procedure will enable us to complete the tender documents for Phase III and IV without any delay if that be requested by you at any future date.

Yang benar,
SAMI MUSAWI INTERNATIONAL/PERUNDING UTAMA

[Signed] [Signed]
... ...
Sami Mousawi Abdullah Mohd. Noor.

This letter shows very clearly that SM and Abdullah Mohd. Noor had practised respectively as architect and engineer when they submitted the various plans mentioned in that letter. Submission of plans by an architect to obtain approval

is work which is chargeable as fee under Part II of the Architects (Scale of Minimum Fees) Rules 1986. The plans will involve structural information which the engineer will provide so as to enable the obtaining of the approval of the plans and such work of an engineer is chargeable under the notification of scale of fees made under s. 4(1)(d) of the Registration of Engineers Act 1967.

Subsequently the claimant on 20 March 1985 submitted a bill for RM2 million plus for professional fees calculated in accordance with the statutory scales of fees. Another bill for professional fees dated 14 March 1988 was also submitted by the claimant for payment.

It was against those undisputed facts that the arbitrators handed down their award.

The Legislation

This is the opportune place to reproduce the relevant ss. 7(1) and 7A(1) of the Architects Act which *mutatis mutandis* are in *pari materia* with the relevant ss. 7(1) and 7A(1) of the Registration of Engineers Act and Quantity Surveyor's Acts, viz.:

> 7. (1) No person shall unless he is an Architect –
>
> (a) practise or carry on business or take up employment as an architect;
>
> (aa) do so under any name, style or title –
>
> (i) bearing the word "Architect" or the equivalent thereto in any other language; or
>
> (ii) bearing any other word whatsoever in any language which may reasonably be construed to imply that he is an Architect;
>
> (b) use or display any sign, board, card or other device representing or implying that he is an Architect; or
>
> (c) be entitled to recover in any court any fee, charge or remuneration for any professional advice or services rendered as an Architect.
>
> (2) Notwithstanding subsection (1), a registered Architectural Graduate may with the written approval of the Board take up employment as an architect.
>
> 7A (1) Notwithstanding subsection 7(1), a body corporate may practise as architects and recover in any court any fee, charge or remuneration for any professional advice or services rendered by it pursuant to its practice as architects carried on by virtue of this section, if it has the written approval of the Board to so practise and has been issued with a valid permit in respect thereof.

(2) ...

(3) The Board shall grant its approval for a body corporate to practise as architects, subject to such conditions and restrictions as it may deem fit to impose. If –

(a) the board of directors of the body corporate consists— (i) entirely of….Architects; or (ii) of a majority of Architects and… other profession allied to the practice of architecture..; and

(b) all the shares…are held by the persons mentioned in subparagraph (a)(i) or (a)(ii), as the case may be, provided always that the Architects shall have a controlling interest and hold such percentage of the voting shares in the body corporate as may be prescribed by the Board.

(4) ... (12) ...

Section 39 which the other arbitrator relied on is in the following terms:

39. Saving as to right of Government

Nothing in this Act contained shall apply to anything done or omitted to be done by or under the authority of the Federal Government or the Government of any State.

As for his reasons for relying on this provision, I will deal with them later after I have considered the complaint of the respondent against the decision of the other two arbitrators.

Grounds For Setting Aside

The respondent applied to set aside the award on the grounds that the arbitrators had misconducted themselves and that there is an error on the face of the record. As for the meaning of error on the face of the record, which sometimes also support allegation of misconduct, the Supreme Court in *Ganda Edible Oils Sdn Bhd v. Transgrain B.V.* [1988] 1 MLJ 428 SC, at p. 430-431, has approved of the following passage:

It was also contended by the appellant that the trial judge erred in law by holding that there was no error of law on the face of the arbitration award. In fact as stated earlier that was the ground on which the application to the judge was based. The principles that have to be applied in the instant case may be set out as follows:

An arbitrator's award may be set aside for error of law appearing on the face to it, though the jurisdiction is not lightly to be exercised. Since questions of law can always be dealt with by means of a special case this is one matter that can be taken into account when deciding whether the jurisdiction to set aside on this ground should be exercised. The

> jurisdiction is one that exists at common law independently of statute. In order to be a ground for setting aside the award, an error in law on the face of the award must be such that that can be found in the award, or in a document actually incorporated with it, some legal proposition which is the basis of the award and which is erroneous.
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> If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit its being set aside; and where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; *but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award*." (*Halsbury's Laws of England*, Fourth Edition, vol 2, page 334, para 623 "Error of law on face of award"). [Emphasis added]

A distinction should be drawn between a case where a dispute is referred to an arbitrator in which a question of law becomes material from the case in which a specific question of law has been referred to him. The position is that in the former case the court can interfere if and when an error appears on the face of the award but in the latter no such interference is possible upon the ground that the decision on the question of law is an erroneous one (per Raja Azlan Shah J (as he then was) in *Syarikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority* [1971] 2 MLJ 210, 211). In that case, no question of law was referred to the arbitrator but what was submitted was a question of law which incidentally and necessarily arose in applying certain facts. In our considered judgment in the present appeal, a similar situation arose. It is clear that in applying certain facts which led to the dispute between the parties, the arbitrator had also to construe the provisions of s. 37 of the SGO which was relied by the respondent and also s. 42 which incidentally arose in applying those facts. Since the reference involved both questions of law and fact, the High Court was in a position to review the award if and when there is an error apparent on the face of the award.

The questions that should have arisen before the judge was (1) whether the arbitrator made wrong inferences of fact from the evidence including the four telexes which were incorporated in the award and (2) whether the arbitrator had erroneously construed the two sections.

In the first place, we are satisfied that the arbitrator had considered all the relevant evidence and had not made wrong inferences of fact. As regards the second point, we are also satisfied after careful consideration that the

arbitrator has construed the two sections correctly in the light of the facts and surrounding circumstances of the case. We also bear in mind that even if we could come to a different conclusion on the matter, we fail to see in the award that the arbitrator has proceeded illegally either by deciding on inadmissible evidence or applying the wrong principles of construction which the law does not recognise.

In fact the authority for part of the passage of *Halsbury's Laws* comes from the case of *Government of Kelantan v. Duff Development Co. Ltd* [1923] AC 395 HL which concerns the construction of a deed. Some of the points to be decided by the arbitrator there were:

(1) What, upon the true construction of the deed of cancellation, was the nature and extent of the obligation of the government in regard to the making of the cart road?

(2) Whether, upon a true construction of the deed of cancellation. The government had entered into a covenant with the company to construct the railway, and if so, in what terms, and what was the nature and extent of the obligation of the government under such covenant?

The court there held that they involve a question of construction. The findings of the arbitrator were summarised in the following words:.

> The arbitrator's award was dated 17 November 1921, and was in somewhat unusual form. The arbitrator thereby declared that he had been pressed to state his views on the points of law raised in the proceedings, and that as to the alleged implied obligation on the part of the Government to build a railway his award was based on a full consideration of all the cases quoted in the arguments, including the cases of *Hamlyn & Co. v. Wood & Co.* (1), and *The Moorcock* (2), passages from which cases he quoted in the award; and proceeded:
>
> > I am of opinion that any attempt to construe the Deed of Cancellation without taking into account (A) the natural features of the country wherein the obligations of the Agreement were intended to be performed and (B) the position of the parties and the circumstances attending the preliminary negotiations and the conclusion of the Agreement must lead to a construction which involves a failure of consideration which cannot have been within the contemplation of either party and will rob the transaction of such efficacy as both parties must have intended that at all events it should have.
>
> And the arbitrator found and awarded as follows:
>
> (1) That the Government was by the express terms of the Deed of Cancellation under contract to construct a cart road within the Concession from a point upstream, *ie*, south of Kuala Tui to a railway running from Pahang to Siamese Territory within a period of four years from July 15, 1912.

(2) That it was an implied term of the Contract that the said road should commence on the west side of the river should proceed in a northerly direction and should have its terminus on the line of the said railway and within the Concession.

(3) That it was an implied term of the Contract that the said railway should be constructed within the time limited for the completion of the said road and should be so constructed as to admit of the construction of the said road having a terminus as aforesaid.

(4) That the Government has failed to fulfil the said terms of the Contract and that by reason of such failure the Company has suffered damage and I direct an inquiry as to the nature and amount of such damage.

The government there sought to set aside the award on the following grounds:

(1) That there is error of law appearing on the face of the award.

(2) That the Arbitrator has wrongly construed the Deed of Cancellation referred to in the award.

(3) That the Arbitrator has wrongly implied terms of and in the said deed as set out in his award.

(4) That in construing the Deed of Cancellation the Arbitrator has wrongly taken into account "the circumstances attending the preliminary negotiations and the conclusion of the Agreement."

(5) That the Arbitrator wrongly received evidence of the said circumstances.

The court there, at p. 409, with regard to the reference as to the construction of the deed of cancellation, said this:

> ... unless it appears on the face of the award that the arbitrator has proceeded on principles which were wrong in law, his conclusions as to the construction of the deed must be accepted. No doubt an award may be set aside for an error of law appearing on the face of it; and no doubt a question of construction is (generally speaking) a question of law. But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon the point cannot be set aside by the Court only because the Court would itself have come to a different conclusion. *If it appears by the award that the arbitrator has proceeded illegally – for instance, that he has decided on evidence which in law was not admissible or on principles of construction which the law does not countenance, then there is error in law which may be ground for setting aside the award*; but the mere dissent of the Court from the arbitrator's conclusion on construction is not enough for that purpose. [Emphasis added]

The court then proceeded to deal with the grounds put forth by the government for setting aside the award but I will only concern myself with the part touching on the consideration of the evidence. This is what the court there said, at p. 411:

> First, it is said that the statement in the award that the arbitrator has taken into account "the circumstances attending the preliminary negotiations and the conclusions of the agreement" shows that he in fact took into account the negotiations themselves and drew from them an inference as to the contract by which the parties intended to be bound. If he did so, he was in error; but I do not think that the statement can be fairly so read…

Therefore it is clear from those passages that the case did decide that acting on inadmissible evidence could constitute an error on the face of the record. Since that passage of *Halsbury's Laws* upon which *Ganda Edible Oils Sdn Bhd v. Transgrain B.V.* relied on is actually a decision of the case of *Government of Kelantan v. Duff Development Co. Ltd*, it must be taken that the case was followed by *Ganda Edible Oils Sdn Bhd v. Transgrain B.V.* That to me is very clear. That, too, means acting on inadmissible evidence could constitute an error on the face of the record.

Recently, the Court of Appeal in *Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & Anor* [1999] 2 CLJ 788 CA preferred, for the purpose of defining the meaning of error on the face of the award, the following passage of *Champsey Bhara Co v. The Jivraj Balloo Spinning & Weaving Co. Ltd* 1923 AIR 66, at p. 69:

> An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound.

That does not present any problem since it is saying the same thing in different ways though the definition adopted by the Supreme Court in *Ganda Edible Oils Sdn Bhd v. Transgrain B.V.* must be followed, being a binding decision. But the Court of Appeal in *Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & Anor* appears to me to lay down a limitation as to when acting on inadmissible evidence can justify the setting aside of an award. This can be gathered from the following passage of Gopal Sri Ram, JCA, speaking for the Court of Appeal, at pp. 796-797:

> On the authorities that I have had the advantage of consulting, such a wide jurisdiction does not appear to exist. However, on a more careful reading of the case it is clear that the learned judge was merely adverting to the arguments made before the Supreme Court in that case and repelling a suggestion by counsel that the arbitrator there had drawn erroneous factual inferences or had considered inadmissible evidence. In my view, the *Ganda Edible Oils* case is not, and should not be read, as authority for the proposition that the ordinary courts are seised of jurisdiction to remit or set aside the award of an arbitrator on the ground that wrong inferences of fact had been drawn or that inadmissible evidence had been let in and acted upon. ... I would refer to and readily accept as correct the following statement of the law by Augustine Paul J in *Jeuro Development Sdn Bhd v. Teo Teck Huat (M) Sdn Bhd* [1998] 6 MLJ 545 at p. 552:
>
> > …The Evidence Act 1950 is therefore not intended to apply to proceedings before an arbitrator … A departure from the rules of the Evidence Act 1950 does not per se amount to misconduct, unless the rules of evidence violated is one which is based on natural justice and an infringement of its, therefore, repugnant to one's sense of justice and fairness.

So, the qualification set by the Court of Appeal is that the inadmissible evidence must result in a violation of the rules of evidence relating to natural justice and that it is repugnant to one's sense of justice and fairness before an award can be set aside.

Whilst it is correct to say that the Evidence Act 1950, by virtue of s. 2, has no application to arbitration proceedings but you cannot ignore it completely and this is recognised in *Jeuro Development Sdn Bhd v. Teo Teck Huat (M) Sdn Bhd* since it allows consideration of whether the departure results in an infringement of the rules of natural justice. If the contrary is true, then gossips and rumours may be acted on by an arbitrator to find an award; such a result is surely as repugnant to one's sense of justice and fairness as the violation of natural justice. When the Court of Appeal preferred the decision of *Jeuro Development Sdn Bhd v. Teo Teck Huat (M) Sdn Bhd*, it did not expressly disapprove of *Syarikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority* [1971] 2 MLJ 210 where, at p. 211, the court, after stating that the failure to analyse and appraise the evidence does not vitiate the award on ground of misconduct, went on to say:

> It is only when the evidence is material, relevant and had gone to affect the award that the award will be vitiated.

and which, in my view, set a different criteria regarding the seriousness of the inadmissible evidence that may result in the setting aside of an award. This case was referred to and in fact approved and adopted by the Supreme Court in *Ganda Edible Oils Sdn Bhd v. Transgrain B.V.* That being the

case, surely the Supreme Court could be said to have accepted the principle that a failure to analyse and appraise evidence will vitiate an award if the evidence is material, relevant and had gone to affect the award.

As for the word "misconduct", it has also not been defined in the Arbitration Act 1952. Setting out examples of misconduct will, in my view, serve to illustrate its meaning better than any definition since no definition can be exhaustive. Conduct that had been judged misconduct and which I am inclined to accept as such are:

(1) Making an award which on grounds of public policy ought not to be enforced (*Halsbury's Laws*, 4th edn, vol 2, p. 330, para 622), as for example an illegal contract (*David Taylor & Son, Ltd v. Barnett* [1953] 1 All ER 843);

(2) Bias *(Kuala Ibai Development Sdn Bhd v. Kumpulan Perunding (1988) Sdn Bhd & Anor* [1999] 1 CLJ 632);

(3) Failure to decide all referred matters (*Assignee v. Chartered Industries of Singapore Ltd* [1978] 2 MLJ 99);

(4) Departing from agreed mode of hearing, that is, the award was to be made after considering written statements of parties and supporting documents, and instead based the award on answers to questions (*K S Abdul Kader v. M K Mohamed Ismail* [1954] MLJ 231);

(5) Acting in absence of and without previous notice to one party (*Chung and Wong v. C M Lee* [1934] MLJ 153);

(6) Failure to analyse and appraise material and relevant evidence which affected the award (*Syarikat Pemborong Pertanian & Perumahan v. Federal Land Development Auhtority* [1971] 2 MLJ 210);

(7) Taking into account inadmissible evidence which resulted in a breach of natural justice which is repugnant to a sense of justice and fairness (*Jeuro Development Sdn Bhd v. Teo Teck Huat (M) Sdn Bhd.*);

(8) Making an award on principles of construction which the law does not countenance (*Ganda Edible Oils*); and

(9) Corruption and fraud.

The Contentions

Datuk JC Fong, the learned Sarawak State Attorney-General, argued that what had been referred to the arbitrators were questions of law which incidentally

and necessarily arose in applying certain facts. For the purpose of his submission, the court's attention was drawn to the fact that the parties had delivered pleadings under which the claimant had alleged a breach of contract in that (1) the respondent had failed to pay outstanding fees of RM300,057.61 due under phase I of the project and (2) the respondent had appointed another consultant to undertake extension works for the mosque. It was the result of the claim that the respondent had breached the CSA that the questions of law framed in the form of the two issues came up for the decisions of the arbitrators. What had to be first ascertained in this case is whether as a fact the claimant, SMI. PU, Sami Mousawi and Abdullah Mohd. Noor had practised as the professionals normally associated with such professionals that are covered by the three Acts. It was from establishing this factual situation that those questions of law as framed by the two issues come to be considered. That being the case, what was submitted to the arbitrators were questions of law which incidentally and necessarily arose in applying certain facts. Support for that conclusion can be found in the decision of *Syarikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority*. Even if it can be concluded that those were specific questions of law were referred to the arbitrators, the award can still be set aside "if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance" (*Ganda Edible Oils Sdn Bhd v. Transgrain B.V.*).

I turn now to the contentions of the respondent as to why the award should be set aside. They can be dealt with together since the one ground could also be the foundation for the other ground and *vice versa*.

The arbitrator had completely ignored the evidence, *supra*, that it was SMI and PU acting through SM and Abdullah Mohd Noor that had submitted plans for approval, that it was the claimant that had submitted and claimed payment of professional fees. That was the contention of the learned State Attorney-General and I am of the view that there is substance in that contention. These two persons together hold 100% of the equity of the claimant. Those evidence completely dispel any doubt SM and Abdullah Mohd Noor had practised the discipline of architect and engineer at a time they were not registered under the relevant Act. Those evidence show beyond doubt that these two persons, whether by themselves or with other professionals, will ultimately be the beneficiaries of the fees for professional services. That is the consequence of the CSA as formed or as performed. In this regard the arbitrator R. Talalla, Esq. was correct in his dissenting view that it was SMI and PU who performed the architectural services through the vehicle of a corporate identity

in the name of the claimant. This learned arbitrator had correctly pointed out that this was in fact the position maintained by the claimant in their pleading in following words:

> The Claimant was, at all material times, a corporate vehicle for a joint venture between Messrs. Sami Mousawi International ("SMI") and Messrs Perunding Utama ("PU"), purpose of which was to undertake the consultation work for the design and supervision of the Project.

This fact makes the finding of the two arbitrators that the CSA does not require the claimant to practise or carry on business or take up employment as architects, engineers or quantity surveyors completely untenable since it was their own pleading and therefore their case that the claimant was formed "to undertake the consultation work for the design and supervision of the project". That is a serious failure to analyse and appraise material and relevant evidence which, following the decision of *Syarikat Pemborong Pertanian & Perumahan*, justifies the setting aside of the award.

If SMI and PU or SM and Abdullah Mohd Noor had claimed for the professional fees they would not be entitled since they are not registered under the relevant acts. Why, then, should the claimant be entitled to claim for the same fees under the name of the claimant when not only SMI and PU but SM and Abdullah Mohd Noor and the claimant were not registered to practice under the relevant Acts? That was the result of the decision of the two arbitrators when they sought to justify their decision by saying that the claimant was not performing but providing for the services. It is precisely that a corporate entity like the claimant cannot by themselves perform the services since such can only be performed by individuals that s. 7A was enacted to prevent the claimant from saying that they did not but someone else performed the services. If the argument of the two arbitrators can be upheld it would mean that a corporate entity need never apply for the approval to practise while allowing unregistered persons to practise under its umbrella. This would render s. 7A completely useless. Such a result should not be had and I had said so in *PP v. Tan Kah* [1993] 1 CLJ 83, 84 since it rendered that piece of legislation completely useless. The award was therefore based on a principle of construction which the law does not countenance and thus, on this ground also and on the authority of *Ganda Edible Oils Sdn Bhd*, the award should be set aside.

The award ought also to be set aside on the ground that as a matter of public policy it should not be enforced for it infringed the three Acts or it at least defeat the objective of the three Acts. The authority for this proposition is *David Taylor & Son, Ltd v. Barnett*.

I turn now to the decision of the other arbitrator who though he came to the decision that the CSA infringed the Acts nevertheless answered the questions in the affirmative because he felt that the CSA was saved by s. 39, which provision I again reproduce:

> 39. Saving as to right of Government
>
> Nothing in this Act contained shall apply to anything done or omitted to be done by or under the authority of the Federal Government or the Government of any State.

The arbitrator had also said that the CSA was impliedly acquiesced or tolerated by his excellency the Yang DiPertua Negeri or the government of the State of Sarawak which assuming that it is true, it does not prevent the respondent from raising the defence of illegality (see *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503). His decision on this point was plainly against the authority and is an error in law which justifies the setting aside of the award (see *Ganda Edible Oils Sdn Bhd*).

As for his reliance on s. 39, I am again in agreement with the learned State Attorney-General that the arbitrator had misconstrued the same or proceeded on an interpretation which the law does not countenance. Section 39 merely restates what has already been generally provided by s. 127 of the Interpretation Act 1967 which says:

> No Act of Parliament, Ordinance or Enactment shall in any manner whatsoever affect the rights of the Yang-di-Pertuan Agong or of the Government unless it is therein expressly provided, or unless it appears by necessary implication, that the Yang di-Pertuan Agong or the Government, as the case may be, is bound.

Section 39 also removes any implication that the State Government is bound. However, though it is not bound it does not mean that it cannot take advantage of the Acts (*Bennion on Statutory Interpretation*, 2nd edn, pp. 317-318).

The claimants had relied on *Ong Teong Pin v. Sim Kwan Meng & Anor* [1994] 1 MLJ 485 to contend that the CSA is not illegal. In order to appreciate the decision in that case one must ascertain what is meant by the term "(a) practise or carry on business or take up employment as an architect;" of s. 7 of the Architects Act. The question of whether a person has done the prescribed acts, that is, "practise or carry on business or take up employment as an architect", depends on finding the answer to what works an architect is usually associated with. This answer is provided in an indirect way by Part II of the Architect (Scale of Minimum Fees) Rules 1986 which sets out the works which an architect can charge which also means setting out the works an architect can do. They can be summarised for the purpose of this case in this way:

(1) attending and advising the client which includes inspection of site and negotiations for the purchase of the site, the drawing up of site plans and providing for alternative design and construction solutions;

(2) preparing the outline project plan involving the preparation of costs estimates, planning and implementation schedule, projection of cash flow, construction costs and finance sourcing and refining them at various stages;

(3) advising on the need for other specialist services and the employment of resident staff for the project;

(4) providing schematic design involving drawing up preliminary conceptual sketch and developing it into sketch design for submission for planning in-principle approval together with all other necessary drawings;

(5) providing development design which takes place after approval had been obtained of the sketch plans;

(6) preparing the contract document and evaluating tenders; and

(7) supervising the implementation of the contract and project.

The works of an architect can also be glimpsed from the laws or by-laws governing the construction of a building. Under s. 8 of the Sarawak Building Ordinance 1994, plans and specifications must be submitted for the approval of the local authority before any person can erect any building. Under bylaw 1(2) of the building by-laws, the plan drawing or calculation must be submitted by a qualified person which is the architect registered under the Architects Act. With that understanding of the meaning of that phrase I turn to the decision of *Ong Teong Pin v. Sim Kwan Meng & Anor*. In that case a design consultant was engaged by a principal consultant to provide an overall image of a proposed hotel, the functional arrangement of the various parts of the hotel building and also the functional arrangement of its operation aspect. The design consultant worked on the design concept in Singapore but presented and explained the same to the developer of the hotel in Miri, Sarawak. That was the work as far as the design consultant was concerned with the principal consultant following it up, like working out the detail plans and submitting the same for approval. The design consultant was paid RM80,000 out of RM220,000. To a claim for the balance, one of the defence was that the contract providing for the services is illegal being in violation of s. 7(1)(c) of the Architect Act 1967. The court there held, upon those facts, that the work of the design consultant was "mainly the preparation of design drawings" and that such work is not within the meaning of "services rendered as an

"Architect"." Thus, the court there held that s. 7(1)(c) does not apply and allowed the recovery of the balance. I respectfully decline to follow that decision because an architect's work includes putting up design concept drawings as set out in the summary (4), *supra*. It is, not only part and parcel, but, in fact an essential part of an architect's work because it is from the concept design that the sketch design materialises so as to enable planning approval to be applied for under the building ordinance and building by-laws. Without a concept of the building, which is formed after taking instructions from the proponent of the building, you have nothing to work on or to develop it further.

In this regard *BEP Akitek (PTE) v. Pontiac Land Pte Ltd* [1992] 2 SLR 251 is more to the point and it supports the contention that assuming that the claimant had merely undertaken to provide the professional services which were done by registered professionals, nevertheless the fees are not recoverable.

Conclusion

In the premises the award is set aside. There is no point in remitting the matter back to the arbitrators since the CSA cannot under any event be enforced on ground of public policy. Cost to the applicant.